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I.R.R.A. INAUGURAL LUNCHEON

"ALTERNATIVE DISPUTE RESOLUTION AND THE NATIONAL LABOR RELATIONS BOARD: SOME RUMINATIONS ABOUT EMERGING LEGAL ISSUES, JOSE CANSECO AND GERTRUDE STEIN"

Delivered by:

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April 8, 1997
Oakland, California

After winter's long doldrums "inside the Beltway" in the nation's capital, it is a great pleasure to be back here in my lovely home state of California -- truly, the greatest place in the entire world -- and to have the opportunity to speak with you and to see old friends like Jerry Allen, Clarence Washington and Tony Capello and to pay homage to so many of the Bar Area labor specialists here, including my former Executive Assistant, Miguel Gonzalez. Jerry has done yeoman work in creating your organization and this event.

It is indeed an honor for me to speak at your Inaugural Luncheon, to have the chance to speak and hear from others earlier this week in Sacramento and San Jose, and to witness this week's arrival of my beloved Boston Red Sox at the Oakland Coliseum. This is a grand moment -- the most recent of many Red Sox vs. A's matchups which I have witnessed annually[1] since my 1972 arrival to California, this one between ex-Bosox slugger Jose Canseco reunited with his other half of the "Bash Brothers." Along with your luncheon, truly this week, to paraphrase the obverse of Gertrude Stein, there is a "here here" on this side of the bay.[2]

I also want to mention Jim Scott, Regional Director of the Board here in Oakland, who has played a leadership role, along with his dedicated and professional staff, in bringing the reality of the statute to the Bay Area. Jim has given a number of talks in my Labor Law I class at Stanford Law School and I know firsthand his commitment to excellence.

And I want to commend all of you on your involvement in our field and to commend you for your involvement in the Industrial Relations Research Association, which is now celebrating its 50th anniversary.

It is good to be back in California and to breathe the fresh air of the east bay hills and the peninsula -- the hills and the mountains and the grand Pacific Ocean in the state which is my home and surpasses any area that I have seen during these past 60 years on earth in any part of the world!

And I want to thank so many in the northern California Congressional delegation who have been such a help to the Agency and to me. Of course, foremost amongst these are Senator Dianne Feinstein and Senator Barbara Boxer who stood by my side in my confirmation hearing three-and-one-half years ago. And then there are my good friends who live in my same building in Washington, D.C., Congresswoman Nancy Pelosi, our number one supporter on the House Appropriations Subcommittee, and my own Congresswoman, Anna Eshoo -- also with me when I appeared before the Senate Labor and Human Resources Committee -- and one who has made a contribution in the area that

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[1] The exceptions to these annual attendances were '75, when I was in Europe and Japan, and '94 and '96, when I was in Washington in my current position.

[2] As you know, in a rather uncharitable and inaccurate comment, Gertrude Stein spoke of there being no "there there" in Oakland.

I am discussing with you today. I would be remiss without mentioning Congressman Ron Dellums, with whom I served at the Democratic Party charter convention in Kansas City in 1974.

And there are so many other good people who are part of the delegation -- Congressman George Miller, who provided me with good counsel before our July '95 House Oversight Committee hearings; my friend Congressman Tom Lantos; Congressman Pete Stark; Congresswoman Zoe Lofgren; my colleague from Stanford, Congressman Tom Campbell; Congressmen Vic Fazio and Robert Matsui and the new member of our northern California delegation, whom I met in California a year ago, Congresswoman Ellen Tauscher.

I thank all of these distinguished people for their fine help and support!

Last week, I spoke to the Edison Electric Institute in Washington, and I want to say to you what I said to them. There are so many "inside the Beltway" types whose preoccupation in life is to fish in troubled waters and to make the waters troubled so that they will have something to do. It is good to speak to groups like yours and responsible employer groups like the Edison Electric Institute and others such as the American Iron Institute, and the Joint Labor-Management Committee of the Retail Food Industries, which I addressed last month -- groups which are interested in promoting harmony and good workplace relationships on the basis of respect and dignity afforded to all. If we had more such efforts, those who promote divisiveness in our society -- demarcation boundaries based upon occupation, income and race -- would have less attention given to them by the press.

The purveyors of dissension in Washington have built a flourishing business aided and abetted by the press that I fear erodes the public's trust in government and feeds a cynicism about public institutions that is harmful to the shaping of sound public policy predicated upon rights and obligations for both labor and management.

For fifty years the IRRA has made a contribution to a more cohesive and democratic society. 1997 is the half century mark not only of its founding, but also for other important events as well that took place during that year of 1947, i.e., Jackie Robinson's first appearance with the Brooklyn Dodgers in which baseball dropped its color ban and employed the first black player in modern times. Next week President Clinton will commemorate Robinson's first appearance by attending the Dodgers vs. Mets game in Shea Stadium. And here, in the Bay Area, we can reflect anew upon that development -- Robinson's rare courage and audacity -- and what it has meant for our country. For in baseball, where Robinson's contribution was both significant on the field and off the field, we witness one of baseball's premier managers, Dusty Baker, at the helm of the Dodgers' perennial rival, our own San Francisco Giants. And in the country at large there is the landmark constitution litigation and comprehensive civil rights legislation which antedates Baker but which emerged in the wake of and, in part, because of Jackie Robinson.

And, the passage of the Taft-Hartley amendments to the National Labor Relations Act is yet another golden anniversary celebration in some quarters. This portion of our statute, once denounced by organized labor and much of the Democratic Party as a "slave labor act"[3] induces all of us to reflect anew about the role of labor law in society and its importance in establishing democracy in the workplace.

I want to speak to you today about a subject that is achieving increasing significance in national labor policy throughout the country -- alternative dispute resolution. It is a matter which the National Labor Relations Board has not yet had the opportunity to address, though cases may come before us in the near future. And it is an issue of particular significance in the nonunion sector which constitutes about 90 percent of the private sector U.S. workforce.

Alternative dispute resolution is likely to occupy the attention of the Congress, the Court and the Board in the very near future. Within the confines and parameters of Supreme Court authority in the arbitration arena,[4] the Board is writing on a relatively blank slate and will continue to do so until and unless the Congress or the Court speaks first.

Grievance arbitration is a long established and well accepted procedure in the unionized sector of the workforce. The process dates back to the 1920s and has been endorsed by the U.S. Supreme Court in the *Steelworkers Trilogy*[5] as a cornerstone of national labor policy. Well established safeguards for employees and employers are contained in collective bargaining agreements, in procedures and protocols of the National Academy of Arbitrators, the American Arbitration Association and in the law.

Using arbitration to resolve employment disputes in the nonunionized sector of the economy is a more recent but rapidly growing practice, a phenomenon accelerated by both emergence of numerous employment-related statues and wrongful discharge actions. Some of you may recall a report[6] that was done by the California Bar Ad Hoc Committee on Wrongful Dismissals, that I co-chaired, which recommended legislation providing for

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[3] William B. Gould IV, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421 (July 1972).

[4] See particularly, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[5] *United Steelworkers v. American Manufacturing Co.* 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[6] Gould, Estes, Rudy, Wise, Hay, McClain, *To Strike a New Balance*, A report of the Adhoc Committee on Termination at Will and Wrongful Discharge Appointed by the Labor and Employment Law Section of the State Bar of California, February 8, 1984. (On file at Stanford Law School.) Mr. Hay and Ms. McClain, a former student of mine at Stanford Law School and a member of the National Labor Relations Board Management Advisory Panel, dissented from some key portions of the report.

arbitration of wrongful discharge disputes in the nonunion arena. Those proposals never became law in California or in any major jurisdiction. But now the adoption of alternative dispute resolution procedures by nonunion employers is moving forward.

The Dunlop Commission, of which I was a member until March 1994, examined the use of arbitration, mediation and other forms of private dispute resolution. It concluded that private parties should be encouraged to adopt in-house alternative dispute resolution systems, and that private arbitration systems should meet certain standards for fairness. The Commission's 1994 final reported:

> The challenge . . . is how to encourage the creative potential of alternatives to standard court litigation, while ensuring that the legal needs and priorities of a diverse American work force are fairly satisfied.[7]

As you know, more than two decades ago a unanimous United States Supreme Court held that, where employees covered by a collective bargaining agreement sue under anti-discrimination and related legislation, they have the right to obtain access to the courts in a *de novo* proceeding regardless of the existence of an arbitration clause and the resolution of the matter before an arbitrator.[8] Subsequently, in a case which has produced a torrent of scholarly critiques,[9] the Court in the *Gilmer* case[10] sent signals that very different rules might well apply in the nonunion sector, precluding employees from suing where an arbitration procedure is in place for individuals where the contract is said to be part of the individual contract of employment.

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[7] Report and Recommendations, Commission on the Future of Worker-Management Relations, December 1994, p. 27. While I did not participate in the preparation of the final report, in my judgment, these recommendations are consistent with the policy considerations that the California State Bar Committee on Wrongful Discharge advocated in 1984. See fn. 6. They are also consistent with our initiatives which promote the appointment of settlement judges to conciliate unfair labor practice cases.

[8] *Alexander v. Gardner-Denver*, *supra.* See also *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

[9] See e.g., Matthew W. Finkin, *'Workers' Contracts' Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Martin H. Malin, *Arbitrating Statutory Employment Claims In the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77 (1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635; Hoyman & Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 49 (Sept. 1984); Stallworth & Malin, *Conflicts Arising Out of Workforce Diversity*, Proceedings of the 46th Annual Meeting of the National Academy of Arbitrators 104 (1994) and Christine Nicholson, *Reconciling 'Alexander,' 'Gilmer' and 'Hawaiian Airlines'* (unpublished paper for Georgetown University Law Center L.L.M., 1995).

[10] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

In my remarks today about some of the issues that may come before the Board in Washington both in the near and not-so-near future, of course, I cannot speak to any of them in the sense that I provide my view of what a specific Board decision would be on a specific set of facts. They are likely to be before us for resolution in adjudication and, therefore, are or will be *sub judice.* On the other hand, on the broad policy issues involved, I entered the fray of discourse on this topic almost thirty years ago and have written extensively on the issues prior to *Gilmer.*[11] I shall continue to present my views in public forums such as this and in my writings.

And now for an examination of some of the key cases which have come through the Board process -- but not yet to the Board itself for adjudication. In *Bentley's Luggage Corporation,*[12] the employer operated a chain of nonunion luggage stores nationwide. The charging party, Letwin, employed as a "regular part-time sales employee," was required to sign an arbitration agreement which provided that in order to remain an employee of the company, any legal action regarding employment, or termination of employment, had to be submitted to "binding arbitration before a neutral third party" under the procedures of the American Arbitration Association. Under such procedures each party would bear its own costs and attorneys' fees and the arbitrator's fees would be "divided equally between the parties." At the same time, the company "emphasized," and the employee was required to acknowledge, that employment was "at will." The agreement stated that if:

> . . . a court decides that this policy [i.e. submitting disputes to arbitration] . . . is not enforceable for some claims, the employee and the Company agree that claims which are legally subject to this policy should be dismissed by the court.

The charging party was terminated because of his refusal to sign the agreement. Other employees stated that they had signed the agreement because they could not afford to refuse to sign the agreement and thus lose their jobs. Unfair labor practice charges alleging violations of Section 8(a)(1) and (4) were filed with the Board alleging that Mr. Letwin's termination, because he refused to sign the agreement, violated the Act.

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[11] Indeed, the Court in *Alexander v. Gardner-Denver Co.*, *supra* at 57, n. 18, relies upon one of my writings. See William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); '*Judicial Review of Employment Discrimination Arbitration,' Labor Arbitration at the Quarter-Century Mark, Judicial Review: As Arbitrators See It*, Twenty-fifth Annual Proceedings of the National Academy of Arbitrators (April 1972); *Judicial Review of Labor Arbitration Awards - Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989). Of course, the last mentioned piece focuses more directly upon Section 301 litigation and not directly the problems of administrative agencies like the National Labor Relations Board or the Equal Employment Opportunity Commission.

[12] Case 12-CA-16658.

In *Bentley's Luggage,* the General Counsel issued a complaint on both Section 8(a)(1) and (4). The General Counsel cited the Supreme Court's *National Licorice* decision,[13] which held that the negotiation of individual contracts of employment, in the circumstances of union majority status, through which employees relinquish the right to strike and the right to demand a union security clause or a written contract with any union, was violative of the statute in the sense that it discouraged, if not forbade, the presentation of grievances. The General Counsel noted that this approach had been applied to a requirement that an employee waive his statutory right to file charges with the Board or invoke his contractual grievance arbitration procedure.[14]

The employer's basic argument was that the agreement was lawful under *Gilmer.* But the General Counsel rejected that decision's applicability to this case. The General Counsel's position was that Congress had evidenced an intent to preclude waiver of access to a public tribunal through the broad language of Section 10(a), which gives the Board authority to remedy unfair labor practices regardless of any other disputes resolution mechanism.

Second, the General Counsel distinguished *Gilmer,* noting that in that case the employee had signed the arbitration agreement and in *Bentley's Luggage* the employee was dismissed because he refused to sign. The General Counsel also noted that, while the EEOC could investigate the age discrimination questions arising in *Gilmer* without the filing of a charge under Title VII, the Board is dependent upon private parties to file charges before its jurisdiction is invoked. Thus, said the General Counsel:

> . . . any attempt by an employer to bar an employee from filing an unfair labor practice charge would foreclose the Board from exercising its statutory jurisdiction.

The General Counsel also noted that since the employees were regarded under the arbitration agreement as at will employees, and no just cause was required to terminate the employee, there would be no actual basis through which one could challenge one's dismissal. Finally, the General Counsel distinguished *Bentley's Luggage* from *Gilmer* because of the Court's stress in *Gilmer* on the employees' education, experience and general sophistication.

Another case, *Bingham Toyota,*[15] in which the General Counsel proceeded to file a complaint, emerged in 1994 as well. The complaint alleged that the discharge of employee

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[13] *National Licorice Co. v. NLRB,* 309 U.S. 350 (1940).

[14] The General Counsel cited *Kolman/Athey Division of Athey Products Corporation,* 303 NLRB 92 (1991); *Kinder-Care Learning Centers,* 299 NLRB 1171 (1990); *Great Lakes Chemical Corp.,* 298 NLRB 615, 622 (1990); *Retlaw Broadcasting Co.,* 310 NLRB 984 (1993).

[15] Case 31-CA-13604.

Rush during a union organizing campaign was on account of union membership and, thus, in violation of Section 8(a)(3).

Rush had signed a document that provided that he acknowledge receipt of the employer's Policies and Procedures Manual and that he agreed to such procedures and that:

> I agree [that] my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself . . . Any disputes regarding . . . any termination [of employment] . . . shall be submitted to binding arbitration . . . . The arbitration shall be final and binding . . . .

Like the provisions in *Bentley's Luggage,* each party was required to compensate their attorneys and to share the costs of arbitration as well as, in this case, the hearing room and the transcript, unless the arbitrator ordered otherwise. The General Counsel took the position that the use of this contract would frustrate access to the Board. And again, the General Counsel noted that the employee involved in *Gilmer* was sophisticated and an experienced businessman and that here the employee, a parts technician, could not have been as sophisticated about his legal rights. Said the General Counsel: "The contract is also voidable on the grounds that it is one of indefinite duration."

In a third case, *Great Western Bank,*[16] it was alleged that the charging party executed an arbitration agreement "in consideration of my employment" which required both current and former employees to use the company's arbitration procedure in lieu of any civil legal proceedings or administrative proceedings or lawsuits, and required the employee to acknowledge that she was "waiving any right that I may have to resolve employment disputes through trial by jury." The employee had the right under the agreement to hire an attorney but was required to pay the fees of any witnesses, stenographic record, and to pay any arbitration award with a cap of $250. The arbitrator's authority was to fashion relief which was "just and equitable" and not to grant an award for punitive or exemplary damages or double or treble damages.

In *Raytheon, E-Systems Greenville Division,*[17] the employer was alleged to have a policy requiring employees to submit any and all employment disputes to arbitration to waive all rights to initiate other legal proceedings. Under this policy, the employer allegedly dismissed or refused to hire workers who would not sign the agreement.

As you can see, the cases have begun to come to the Agency -- though none yet to the Board for adjudication. Meanwhile, the development of alternative dispute resolution systems, particularly in the nonunion sector, has generated a number of responses. On February 3 of this year, the American Bar Association approved the so-called due process

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16 Case 12-CA-16886.

17 Case 16-CA-17970.

protocol for mediation and arbitration statutory disputes arising out the employment relationship.[18] The protocol, however, did not achieve consensus on the question of whether an agreement requiring final and binding arbitration, which is formulated in advance of the dispute in question, is appropriate. Nor did it resolve differences on the question of whether an employer can insist upon such an agreement as a condition of employment, rather than providing that it be both informed and voluntary. Nor did it address the question of the right of employers to obtain waivers from employees of statutory claims or access to some public tribunal.

The protocol, however, did focus upon so-called standards of exemplary due process. It provided that employees have the right to be represented by ". . . a spokesman of their own choosing" and that the procedure should reference institutions which might provide assistance to employees.

On the question of fees for representation it stated that the issue should be determined between the claimant and the representative. Stated the protocol:

> We recommend . . . a number of existing systems which provide employer reimbursement of at least a portion of the employees attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law on the interest of justice.

The protocol also attempts both to establish standards for roster membership for such cases and explicitly advises mediators and arbitrators that they ". . . should reject cases if they believe the procedure lacks requisite due process." It purports to oblige institutions to train individuals to hear such cases and that agencies such as the American Arbitration Association may submit names of qualified arbitrators to the "parties."

Finally, on the issue of the scope of review, the protocol states that the arbitrator's award should be ". . . final and binding and the scope of review should be limited."

Meanwhile, the development of such procedures has began to attract attention in the Congress. Thus, my Congresswoman, Representative Anna Eshoo has introduced legislation for herself as well as Congresswoman Nancy Pelosi of the 8th District -- to the north of my 14th District here in California -- and such others[19] as Congressman Ronald Dellums of Oakland and Representatives Edward Markey and Jesse Jackson, Jr., -- here

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[18] The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, dated May 9,1995.

[19] H.R. 983 was introduced by Representatives Markey, Morella, Eshoo, Jackson of Illinois, Furse, Gonzalez, Berman, Oliver, Pelosi, Eddie Bernice Johnson of Texas, Tierney, Frost, Dellums, Vento, Frank of Massachusetts, Flake, Stark, Rush, Nadler, Romero-Barceló, Faleomavaega, Fattah and Norton.

legislation has been triggered by concern about sexual harassment in the securities industry. H.R. 983, introduced on March 6 of this year, amends the civil rights statutes -- not the National Labor Relations Act -- to:

> . . . prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability; and for other purposes.

The legislation and much of the litigation which has preceded have focused upon a number a issues which are bound to come before both the Board and the Court in the future. Insofar as the Board itself is concerned, the issues are likely to come before us in one of two ways. In the first place, they will emerge as the result of mandatory systems which requires as a condition of employment that employees both accept arbitration and lose or possess a substantially diminished access to the Board and the Act. The cases that I have described thus far provide a good illustration of what is involved there although, I am sure that there will be a number of variations on these themes.

The second way in which they can come before us involves the question of deference by the Board to arbitration, i.e., deference both prior to resort to arbitration and subsequent to the arbitration award itself. The question of Board review of arbitration awards is something that has confronted the Board under collective bargaining agreements for more than forty years and it is an issue which is before us at present.[20] But what is involved here is whether the principles that have emerged in both pre-arbitration deferral, as reflected in the so-called *Collyer*[21] line of authority, is whether the same principles that have emerged here have any applicability to the nonunion sector.

As I have said, thirteen years ago I co-chaired the California State Bar Committee on Wrongful Discharge which issued a report advocating comprehensive legislation which would mandate arbitrations. We suggested – though there were admitted constitutional issues involving preemption which we addressed – that the existence of mandated arbitration at the state level could, with good effect, apply to disputes involving union organizational campaigns covered by the National Labor Relations Act where the union or individual employees filed charges alleging discrimination on account of Section 8(a)(3). In the present context, of course, arbitration of such disputes would complicated by the fact that it would require consent by both sides, and I am not sure that consent would be provided by employers in a substantial number of theses cases, and perhaps not by unions themselves.

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[20] See, e.g., *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). In *Mobil Oil Exploration & Producing, U.S., Inc.*, Case 15-CA-12801, we have the opportunity to consider this issue anew.

[21] *Collyer Insulated Wire,* 192 NLRB 837 (1971).

As my friend at the Harvard JFK School, Jay Siegel, has pointed out[22] the savings to the Agency and the parties in terms of litigation and various levels of appeals, both before the Board and the courts, would be enormous. The incentive for the employer would be that, by virtue of prompt resolution of the matter, backpay and liability would be limited. From the perspective of unions, they would be able to get an expeditious determination which might thus diminish a "chilling" of their campaign.

I think that the policy proposal put forward by our California State Bar Committee thirteen years ago was a good one. But then and now the focus must be upon whether certain ingredients are contained in the machinery which is available to the parties.

1. Impartiality

In my first writings on this subject, almost three decades ago, I expressed concern about the near complete absence of racial minorities and women from the ranks of the blue ribbon National Academy of Arbitrators.[23] Congresswoman Eshoo, along with Congressmen Jackson and Markey, in a February 3, 1997 letter to Chairman Arthur Levitt of the Securities and Exchange Commission, quoted a recent General Accounting Office report that most New York Stock Exchange New York Arbitrators are white men averaging 60 years of age.

In addition to racial, ethnic and sexual diversity, it is particularly important that arbitrators actually have expertise on public law issues when they are raised.

When I first wrote about this subject, many arbitrators at the National Academy of Arbitrators meetings stated that their work was in the area of contract interpretation and did not involve public law -- and they didn't want to address the latter. Those are the kinds of arbitrators who should not be appointed in connection with such matters. While the courts must always exercise more review than exists in connection with contract interpretation cases under *Steelworkers Trilogy* and its progeny where public law issues are involved, the fact of the matter is that choosing arbitrators with capability and background in the employment discrimination arena is both fair and efficient because it makes less likely an effective challenge of awards -- and, equally important, it provides more fairness to the parties and confidence in this process.

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[22] Jay Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes*, (1996 unpublished).

[23] In 1970, I was the second black arbitrator admitted to the Academy in its entire history. The late Lloyd Bailer was the first. Since my admission to the Academy, I have issued two awards under standards which purport to give the arbitrator the same authority as a federal judge in employment discrimination matters. See *Weyerhauser Company, Oklahoma and Arkansas Regions*, 78 Lab. Arb. 1109 (1982) and *Basic Vegetable Products, Inc.* 64 Lab. Arb. 620 (1975).

Closely related to all of this is the question of finance. Again the American Bar Association protocol states that costs should be shared although the inequities that this could impose upon some employees, particularly low paid workers, must be accommodated. If both do not have a financial stake in the arbitration process, the process is more likely to be dominated by one side, i.e. the employer.

Another aspect of impartiality is the selection of arbitrators. Somehow employees affected by it have to brought into the process, a perplexing problem where there is no union. The promotion of employee involvement, under the National Labor Relations Act and state legislation promoting such institutions as health and safety committees, is more likely to bring into existence an employee group which can be consulted about the establishment and administration of such a procedure. Good public policy dictates that this is important as a matter of economic democracy.

Of some relevance to this issue is the petition currently pending before us filed by 37 professors, as well as a complaint issued by the General Counsel[24] which would establish an employee right to representation when discipline or discharge is imposed in the nonunion arena as well as the unionized arena where this is already accepted. The move toward employee participation and statutory protection for employees in disciplinary situations[25] makes it more likely that parties will be consulted about such procedures. And, of course, it is axiomatic that both parties be involved in the selection of the arbitrator. This is why I think that the American Bar Association protocol advocating that each side be provided with the arbitrator's recent decisions and relevant information as well as the ABA has said, institutions which might offer assistance, i.e., "bar associations, legal service associations, civil rights organizations, trade unions, etc."

2. Authority of the arbitrator

If arbitrators are going to play the role of a surrogate for resolution of public law claims, then they must not only provide for standards of liability, but also fashion remedies.

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[24] In *Materials Research Corp.*, 262 NLRB 1010 (1982) the Board held that the principle established in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), i.e., that an employee who calls on a union representative to assist in a disciplinary interview is engaged in concerted activity applies to representation for nonunion employees. This was subsequently reversed in *E.I. DuPont de Nemours & Co.*, 289 NLRB 627 (1988) by the Board. Now 37 professors have petitioned the Board to use its rulemaking powers to provide *Weingarten* representation rights in disciplinary hearings to employees in nonunion workplaces. See Petition for A Rulemaking Proceeding Regarding Weingarten-like Rights in the Nonunion Workplace (November 25, 1996). Moreover the General Counsel has authorized Regional Directors to issue complaints in such cases in order to seek reversal of *DuPont*. At least one such complaint has already been issued and is currently pending trial. The case is *Epilepsy Foundation of N.E. Ohio,* 8-CA-28169 and 28264.

[25] Of course, I express no view on the resolution of this issue if and when it reaches the Board.

This is a problem under the common law of wrongful dismissal and the Civil Rights Act of 1964, as amended in 1991, where punitive damages are available and where arbitrators have been traditionally reluctant to fashion relief which will sting one side. But for us at the Board, regrettably, this is not a problem because our statute does not provide for punitive damages or fines and thus if arbitrators were appointed in nonunion relationships they could easily provide the relief that our statute does.

My hope is that parties will begin explore new avenues which will provide effective procedures to which the Board can defer and will pass muster in other contexts. As I have said, I do not know where my vote will be on a given set of facts and legal arguments. However, for years I have viewed the arbitration procedure both in union and nonunion arenas to be a constructive step forward. This is what we need in our society in a labor-management environment like ours where the actions of so many are harmful rather than helpful.

Again, I commend you for your positive efforts I know that you and so many others will make a contribution on this debate as we move toward a more equitable and balanced employment relationship which takes into account both employee protection as well as the ability of management to function effectively without the prospect of big jury trial damage awards.

And I wish you Godspeed in your work in the future.

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